IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-1243

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

-against-

FERNANDO BERMUDEZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BONILLA IN OPPOSITION

DIANA BUDZANOSKI
WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
(212) 577-3420
Attorneys for Respondent Bonilla

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-1243

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

FERNANDO BERMUDEZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BONILLA IN OPPOSITION

OPINIONS BELOW

The order of the Court of Appeals and the opinion of the District Court for the Southern District of New York appear in the Appendix to the Petition. The Magistrate's report is appended to this brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals correctly decided Respondent Bonilla had not waived his right to separate counsel and that defense counsel's obligations to the jointly represented respondents compelled counsel to subordinate Bonilla's interests to the collective interests of the group and prevented counsel from shaping Bonilla's defense according to the evidence at trial thereby denying him the effective assistance of counsel under the Sixth and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments VI and XIV. The text appears in the Petition at 2-3.

STATEMENT OF THE CASE

The respondents were indicted, inter alia, for intentional murder. N.Y. Penal Law §125.25(1) (McKinney 1975). In January 1974 they went to trial before the Honorable William Kapelman, J.S.C., and a jury, represented by a retained attorney, Stanley L. Siegel, Esq.

The prosecution witnesses, the family and friends of the deceased, established that the deceased engaged in a fight with the respondents. Medical evidence showed that the deceased received a single fatal stab wound, a bruise, and an abraded lip during the fight. None of the witnesses saw the stabbing occur, and no clear picture of the sequence of events or of the role of each respondent emerged. The prosecutor conceded that he could not prove who inflicted the fatal wound and asked for a guilty verdict if the jury were convinced that the respondents acted as accomplices to cause the death of the victim (T. 90, 101, 197, 162, 201, 220, 229, 263A-265; RA. 3-5).*

Respondent Bonilla, the only defense witness, identified the victim as the initial aggressor. Bonilla denied being armed with a knife, and did not believe his friends were either (T. 302-04, 366-69, 371-72). The jury convicted the three of intentional murder. On March 12, 1974, Bonilla received the minimum sentence of 15 years to life on the murder conviction.

---

*Numbers prefaced by "T" refer to the trial transcript; by "RA " to the Appendix to Respondent Bonilla's brief; and numbers followed by "a" refer to the Appendix to the Petition.

Bonilla appealed his conviction to the Supreme Court of the State of New York, Appellate Division, First Department. He argued, inter alia, that he had been denied the effective assistance of counsel, because his individual interests were subordinated to the collective interests of the group, and because counsel was unable to shape Bonilla's defense according to the evidence at trial. He also contended that he had not waived his right to separate counsel. The District Attorney did not dispute this contention and responded only that Bonilla was not prejudiced by the joint representation. The judgment of conviction was affirmed by the Appellate Division on February 15, 1977. Leave to appeal to the New York Court of Appeals was denied by then Chief Judge Breitel on April 14, 1977.

Subsequently, Bonilla petitioned for a writ of habeas corpus in the Federal District Court for the Southern District of New York, as had his codefendants. Respondent Bermudez's petition included the affidavit of defense counsel alleging that before trial in an off-the-record conference counsel had informed the judge that a conflict existed and had requested that his clients have separate counsel, and that the judge replied that this was a "stalling tactic." In response the prosecutor affirmed that it was the judge who raised the question. The judge affirmed that he had raised the issue during a conference in chambers and had instructed counsel to discuss the matter with respondents. Subsequently, counsel assured him that respondents were satisfied with joint representation.

The petitions of Bermudez and Laureano were referred to a Magistrate. The Magistrate issued a report recommending that the writ be granted in which she specifically concluded that the allegations of the trial judge, if accepted, did not make out consent to the joint representation (RA. 15-17).

After the issuance of the report the trial judge submitted a second affidavit in which he alleged that he had inquired of counsel in the presence of respondents whether they had been advised of the risks of joint representation, and further, that he "believed" that he had asked respondents personally whether they wished to proceed jointly represented.

The District Court adopted the findings of the Magistrate, and deemed them applicable to Bonilla. Alluding to both affidavits of the trial judge in the course of deciding that respondents had exhausted their state remedies (an issue petitioners have abandoned in this Court) (6a-7a), the District Court concurred with the Magistrate that respondents were prejudiced by the joint representation and granted the writs.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, raising the same issues of lack of prejudice and failure to exhaust state remedies they had in the District Court. On November 26, 1979, that Court summarily affirmed the granting of the writ on the opinion of the District Court (1a-2a).

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY DECIDED RESPONDENT BONILLA HAD NOT WAIVED HIS RIGHT TO SEPARATE COUNSEL AND THAT DEFENSE COUNSEL'S OBLIGATIONS TO THE JOINTLY REPRESENTED RESPONDENTS COMPELLED COUNSEL TO SUBORDINATE RESPONDENT BONILLA'S INTERESTS TO THE COLLECTIVE INTERESTS OF THE GROUP AND PREVENTED COUNSEL FROM SHAPING RESPONDENT BONILLA'S DEFENSE ACCORDING TO THE EVIDENCE AT TRIAL THEREBY DENYING HIM THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

This Court should deny the petition, for the issue as posed by petitioners is not presented on this record. In the state court petitioners argued only that Bonilla had not suffered from the joint representation and did not dispute Bonilla's claim that he had not waived his right to separate

counsel (see 7a, n. 1).* As this case has progressed through the courts, petitioners have transmuted their claim into an argument that Bonilla consented to the joint representation and thereby waived the right to claim ineffective assistance because of it, apparently abandoning the argument that Bonilla was not prejudiced by the joint representation. This record does not establish, and no court has found, that Bonilla consented to the joint representation and waived his right to redress for ineffective assistance of counsel arising from it.

Petitioners misconstrue the decisions of the courts below when they claim that the District Court and the Court of Appeals "disregarded" the trial judge's affidavits establishing consent and that these courts "ruled, in effect, that Bonilla could not consent to joint representation prior to trial" (Petition at 6). Correctly interpreted, these decisions hold that Bonilla did not consent. The Magistrate considered the question of consent at length and examined the allegations supporting a finding of consent, as then put forward by petitioners, in light of Kaplan v. Bombard, 573 F.2d 708 (2d Cir. 1978), a case which considered the constitutional requirements for a finding of voluntary and knowing consent to joint representation and which found that the defendant Kaplan had consented. The District Court adopted the Magistrate's findings. In its decision it explicitly referred to the trial judge's second affidavit submitted after the Magistrate's report (6a-7a, 9a, n. 2). Obviously, the District Court

*On the state appeal the District Attorney had two opportunities to assert that there had been a waiver. Before the appeal was perfected the District Attorney and the office of the trial judge were advised that Bonilla intended to raise the conflict issue. In an effort to determine whether the trial judge had made an inquiry on-the-record as required by People v. Gomberg, 38 N.Y.2d 307 (1975), appellate counsel moved to have the record enlarged. In response to the motion the District Attorney did not assert that a waiver was obtained off-the-record. In their brief on the merits the District Attorney could still have asserted that the record was inadequate on the issue of waiver and asked for a hearing (People v. Rivera, 62 A.D.2d 767 [1st Dept. 1978]), but did not.

determined that the new affidavit did not alter the finding of lack of consent. Similarly, the Court of Appeals by summarily affirming expressed its agreement with this finding. Consequently, the decisions in this case are not in conflict with this Court's prior rulings in Holloway v. Arkansas, 435 U.S. 475 (1978), or Glasser v. United States, 315 U.S. 60 (1942), or the decisions of other circuit courts as cited in the Petition at 7.

Since the courts below made no finding of consent, the question before them was the existence of a real conflict of interest hampering the defense and causing prejudice to respondents. They correctly decided that such a conflict existed.*

As this Court has recognized, jointly represented defendants may suffer because of what their attorney is prevented from doing. Holloway v. Arkansas, supra, 435 U.S. at 489-90. Consequently, a prejudicial conflict exists when an attorney representing several defendants cannot put forward on behalf of one of them a defense based on the evidence at trial, because it would harm the interests of another. Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir., 1975); Austin v. Erickson, 477 F.2d 620, 623-26 (8th Cir. 1973); and Robinson v. Parratt, 421 F. Supp. 664, 670-72 (D. Neb.), aff'd, 546 F.2d 764 (8th Cir. 1976). See Smith v. Regan, 583 F.2d 72, 77 (2d Cir. 1978); and United States v. Bernstein, 533 F.2d 775, 788 (2d Cir.), cert. denied, 429 U.S. 998 (1976). It exists when an attorney cannot cross-examine a witness on

*Cuyler v. Sullivan, 593 F.2d 512 (3d Cir. 1979), cert. granted, 48 U.S.L.W. 3217 (U.S. Oct. 1, 1979) (No. 78-1832), pending before this Court, apparently raises the issue of whether the right to the effective assistance of counsel is breached by the mere possibility, however remote, that a conflict of interest may exist, 48 U.S.L.W. 3014. If that is the correct standard, the Court of Appeals judged Bonilla's claim meritorious by too strict a standard. If it is not and actual prejudice is required, the Court of Appeals applied the appropriate test.

behalf of one client because of his responsibilities to ano-another. Glasser v. United States, supra, 315 U.S. at 72-73. See Kaplan v. Bombard, supra, 573 F.2d at 713; and United States v. Bernstein, supra, 573 F.2d at 788. It also exists when counsel should and does not distinguish the position of one defendant and dissociate him from the others because of counsel's divided loyalties. United States ex rel. Hart v. Davenport, 478 F.2d 203, 208-10 (3d Cir. 1973); and Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965).

Bonilla's defense was disabled in each of these ways. The strength of the prosecution's case lay in the irrefutable testimony placing the three respondents at the scene and establishing that one of them must have fatally wounded the victim. The weaknesses lay in the lack of proof as to which respondent actually inflicted the wound and when it happened; in the confused and contradictory accounts of the event given by the witnesses; and in the need to rely on varying accounts of each respondent's conduct at the scene to establish that he intended to commit murder.

In the factual and legal posture of this case, Bonilla's only viable defense was to convince the jury that his conduct at the scene demonstrated that he had neither killed nor intended to kill the victim and that one of the others must have. However, counsel avoided clarifying the sequence of events and isolating the conduct of any of his clients, because of the severe risk that limiting the participation of one defendant would redound to the disadvantage of another. Defense counsel was forced to adopt a united defense for all three respondents, but as the District Court wrote:

> to argue, as defense counsel did at trial, that all three men were innocent was indeed a hollow defense which inevitably redounded to the disadvantage of at least two, if not all three, de-defendants (8a).

In conclusion, the Court of Appeals decided in Bonilla's favor applying principles consistent with this Court's prior decisions and with the decisions of other circuit courts. The writ should not be granted.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

DIANA BUDZANOSKI
WILLIAM E. HELLERSTEIN
Attorneys for Respondent Bonilla

February, 1980